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Before the
Federal Communications Commission
Washington, D.C. 20554

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In re Applications of)	MM Docket No. 93-241
)	
DARRELL BRYAN)	File No. BPH-920109MA
)	
SBH PROPERTIES, INC.)	File No. BPH-920123MD
)	
)	

For Construction Permit for
New FM Channel 276A
Tusculum, Tennessee

To: Honorable John M. Frysiak
Administrative Law Judge

REPLY TO
OPPOSITION TO PETITION TO ENLARGE ISSUES AND
THRESHOLD SHOWING OF UNUSUALLY POOR BROADCAST RECORD

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December 10, 1993

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SUMMARY

It has been established that, admissions against interest have been made in the context of unsolicited conversations by WSMG employee, Kathy Knight, and her father, Frank Harkins, which indicate that one or both of them have or will have an interest in Bryan's application or the proposed station, which interest has not been disclosed. Appropriate issues should be added.

It has been established that, during Darrell Bryan's ownership and operation of WSMG(AM), Greeneville, Tennessee, the station has engaged in a willful and continuing course of operation in which the station's carrier was left on, unmodulated, uncontrolled and unattended from midnight to 4:30 AM, Monday through Saturday and midnight to 6:00 AM on Sundays, from December, 1992 until sometime in July, 1993. This course of operation violated Sections 73.932, 73.933, 73.1201, 73.1560, 73.1745, 73.1820, 73.1860 of the Commission's Rules. Appropriate issues should be added.

It has further been established that, during Darrell Bryan's ownership and operation of WSMG, the station has engaged in a willful and continuing course of operation, beginning sometime in July, 1992 and ending in August, 1993, during which the stations transmitter was operated by remote control without the benefit of accurately calibrated remote monitoring meters in violation of Sections 73.51, 73.1410 and 73.1860 of the Commission Rules. Furthermore, a material question of fact remains whether the station also operated in excess of its authorized power within the same period of time. Appropriate issues should be added.

It has further been established that, during Darrell Bryan's ownership and operation of WSMG, the station has failed to maintain in its local public inspection file and make available for public inspection, during regular business hours, the required quarterly issues/programs lists for any quarter during the periods from October, 1986 through December, 1990; July through December, 1991 and July through December, 1992, in violation of Sections 73.3526(a)(9) and 73.3526(e) of the Commission's Rules. Furthermore, there remains a material question of fact regarding whether lists were prepared in a timely manner for the quarters in question and whether and, if so, when they were ever placed in the public file. In addition, those lists which have been placed in the public file are deficient and fail to reflect any significant treatment of issues of concern to the community. Appropriate issues should be added.

Finally, the evidence adduced to date is sufficient to establish a threshold showing of an unusually poor broadcast record on the part of Darrell Bryan and, accordingly, the standard comparative issue should be enlarged to permit inquiry into his past broadcast record.

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SBH Properties, Inc. ("SBH"), by counsel, herewith submits its Reply to the "Opposition to Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record," filed by Darrell Bryan ("Bryan"), on November 12, 1993. ¹/ In support whereof, the following is shown:

I. Undisclosed Principal/Real Party In Interest Issues.

1. In its Petition, SBH sought issues to determine whether Kathy Knight, an employee of Bryan's AM station, WSMG, and Frank Harkins, her father, were undisclosed principals or real parties in interest with respect to Bryan's application. SBH's request

1. An extension of time for filing up to and including December 10, 1993, was granted by Order (93M-728), released November 26, 1993.

for issues was premised upon certain admissions against interest made by Ms. Knight and Mr. Harkins in unsolicited conversations with Kent Bewley, a non-voting shareholder in SBH. In Declarations appended to Bryan's Opposition Bryan, Ms. Knight and Mr. Harkins deny that Ms. Knight or Mr. Harkins has or will have any interest, whatsoever, in Bryan's application or proposed station. However, mere denials, standing alone, carry little weight, inasmuch as it cannot be reasonably expected that the existence of an undisclosed interest would be readily acknowledged by the very parties to that undisclosed agreement or understanding.

2. In her Declaration, Ms. Knight contends in contradictory fashion that she did not approach Mr. Bewley on a "fact finding mission" for Bryan, while two sentences later she acknowledges that she did tell Bryan that she felt comfortable talking with Mr. Bewley because she had known him for many years. She also acknowledges that the purpose of her conversation was to attempt to dissuade Mr. Bewley from continuing to participate in SBH's application. Furthermore, Ms. Knight acknowledges that she used the words "we" and "us" in referring to Bryan's application. While she indicates that she typically uses the words "we" and "us" when talking to prospective advertisers on behalf of WSMG, this attempted explanation ignores the fact that the application for the new FM station at Tusculum, Tennessee was filed by Darrell Bryan as an individual, not by WSMG or its licensee (and her employer), Burley Broadcasters, Inc. Indeed, the totality of

Ms. Knight's Declaration clearly reflects that in her conversation with Mr. Bewley she identified her interests with those of Darrell Bryan with regard to the application for the FM station. Thus, while the nature of her interest was unclear, the existence of her interest was clearly implied by the statements which she acknowledges having made to Mr. Bewley.

3. Mr. Harkins acknowledges in his Declaration that he approached Mr. Bewley on his own initiative and that his purpose in doing so was, like that of his daughter, to dissuade Mr. Bewley from continuing to participate in SBH's application. He indicates that he hoped to accomplish this by emphasizing that "it was the WSMG people who were trying to get the FM station." Who these "WSMG people" were, if not Darrell Bryan and Kathy Knight, he does not explain. Nor does Harkins deny the possibility that Ms. Knight may have an undisclosed interest in Bryan's application, which would be sufficient to explain his unusual level of interest in SBH's application. Although denying that he made the statements attributed to him by Mr. Bewley, Mr. Harkins acknowledges that he does not "recall the exact words that I used during my April, 1992 conversation with Kent Bewley."

4. However, Kent Bewley indicates in his attached Declaration (Exhibit A) that, unlike Mr. Harkins, he has a clear recollection of the statements made to him by Mr. Harkins in April, 1992. This undoubtedly is due to the unusual and unexpected nature of the conversation he had with Mr. Harkins in 1992 and the curious nature of the admissions against interest

made by Mr. Harkins in the context of that conversation. Furthermore, as reflected in the attached Declaration of William Seaver, the statements attributed to Frank Harkins in the September 28, 1993 Declaration of Kent Bewley are entirely consistent with what Mr. Bewley told Mr. Seaver about his conversation with Harkins, shortly after it occurred in April, 1992. In addition, Mr. Bewley notes in his attached Declaration that Mr. Harkins is hardly as destitute as the statements made in his Declaration would lead one to believe.

5. At paragraph 5 of his Opposition, Bryan correctly states the test for determining whether a person is a real party in interest. However, if Frank Harkins and Kathy Knight made the statements attributed to them by Mr. Bewley, the possibility that one or both of them would be in a position to "control actually or potentially the proposed station" is established, inasmuch as admissions against interest are to be accorded great weight and as the Commission has long recognized the leverage inherent in the provision of funding. As noted above, Ms. Knight's contention that her use of terms "us" and "we" merely reflected her association and representative capacity with respect to WSMG ignores the fact that in the context of the conversation at issue, the application being discussed was not that of WSMG but of Darrell Bryan, as an individual. Indeed, Bryan has proposed to divest any and all interest in WSMG and Burley Broadcasters, Inc., Ms. Knight's employer, in the event his application is granted. Furthermore, the statement made by Mr. Harkins to Mr.

Bewley can only reasonably be interpreted as an indication of his intention to "help them" financially and his admission against interest that he anticipated being involved "like you and Paul," can only reasonably be interpreted as indicating his intention at minimum to function in the role of a passive investor.

6. Accordingly, SBH's request for real party in interest/undisclosed principal and associated misrepresentation issues are hardly based upon mere "speculation and innuendo." Where persons not party to an application make admissions against interest which may reasonably be interpreted as indicating that they will, in fact, have an interest, such admissions against interest should be given significant weight and deemed sufficient to establish prima facie evidence of such interest, warranting further inquiry, and appropriate issues should be added.

II. Unmodulated, Unmonitored and Unattended Operation.

7. In its Petition, SBH sought addition of an issue to determine whether Bryan violated the Commission's Rules in his operation of WSMG by permitting the station's carrier to remain on, unmodulated, unmonitored and unattended, following sign-off. In his Opposition, Bryan acknowledges not only that the transmitter was left on, unmodulated, unmonitored and unattended on the dates indicated in SBH's Petition, but that the station had been so operated consistently from December, 1992 through July, 1993, a period of over six months. Furthermore, in a Declaration appended as Attachment D to his Opposition, Bryan acknowledges that this course of operation was entirely willful

and was undertaken "while it was being determined what transmitter components needed replacing." However, Bryan fails to offer any explanation, whatsoever, indicating why over six months were required to make that determination. Nor, indeed, could he, for, as reflected in the attached Declaration of David Murray (Exhibit C), such a determination could have easily been made within the course of 1-2 evening maintenance sessions.

8. Bryan's contention that he considered such operation to be consistent with the provision in the Commission's Rules for operation during the experimental period, which is provided solely for the purpose of "testing and maintenance," as well as his contention that he believed that it was not necessary to air station identification announcements or have an operator on duty during these periods of operation, reflect at best an inexcusable ignorance of the Commission's Rules. However, Bryan's claimed belief as to the appropriateness of his actions (the bona fides of which are subject to serious question), would not in any event excuse his failure to comply with the Rules, inasmuch as licensees are charged with the responsibility of being familiar with the applicable Rules and their failure to do so is itself a dereliction of licensee duty.

9. In light of his admission that he permitted the transmitter to remain on, unmodulated, unmonitored and unattended, from midnight to 4:30 a.m. Monday through Saturday and from midnight to 6:30 a.m. on Sundays from December, 1992 until sometime in July, 1993, it must be concluded that under

Bryan's operation and control, WSMG engaged in a willful and continuing violation of applicable Rules. Thus, as indicated at paragraphs 10-11 of SBH's Petition, Bryan's unmodulated, unmonitored and unattended operation of the station violated Sections 73.932, 73.933, 73.1201, 73.1820 and 73.1860 of the Commission's Rules, a fact which Bryan does not dispute. ²/ Furthermore, these violations were not mere technicalities, but involved violations considered by the Commission to be of utmost seriousness, ³/ nor were they sporadic, but continuous in nature, occurring on a daily basis for a period of over six months.

10. At paragraph 9 of his Opposition, Bryan indicates that no issue is required, inasmuch as he has acknowledged the unlawful nature of his operation of WSMG. However, the addition

2. Bryan does not deny that he violated the Rules. On the contrary he indicates that he should be excused for his noncompliance, due either to his ignorance of the Rules or the fact that he had a reason (however lame) for violating them. Bryan's cavalier attitude toward compliance with Commission Rules, evidenced not only by his operation of WSMG, but also by the nature of his response to SBH's allegations, has predictive value with regard to his future conduct as a licensee and, accordingly, is relevant and should be considered under appropriate issues.

3. In a Public Notice News Release (No. 40533), released November 9, 1933, the Commission gave notice of the issuance of Notices of Apparent Liability against 39 stations, proposing forfeitures in varying amounts. In so doing the Commission identified the "most common violations" leading to the proposed forfeitures, most of which are present here: operation with incorrect power, failure to comply with emergency broadcast system requirements, failure to make public inspection files available or to include required documents and failure to have an operator on duty.

of an issue is appropriate even where the facts are admitted and the issue may disposed of by summary decision. ⁵/ Likewise, Bryan's contention that the addition of a qualifying issue in this context would not serve a deterrent purpose is equally erroneous. Furthermore, in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC2d 1179 (1985) the Commission made it abundantly clear that violations of the Communications Act, Commission Rules and policies would continue to be treated "as having a potential bearing on character qualifications." Id. at 1209. With regard to such misconduct as does not involve fraud or misrepresentation, the Commission stated: "We find it appropriate and sufficient to treat any violation of any provision of the Act or of our Rules or policies as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability, without further differentiation." Id. at 1209-10. The Commission further identified three factors to be utilized in determining the weight to be accorded acts of misconduct: "the willfulness of the misconduct, the frequency of such behavior and its currency are relevant to the process of making predictive judgements about future broadcast performance." Id. at 1227. The numerous rule violations which have been identified with respect

5. To accept the contrary proposition, advanced by Bryan, would for example allow an applicant to avoid the addition of a misrepresentation issue by merely acknowledging that it had lied to the Commission.

to Bryan's operation of WSMG meet each of these tests, inasmuch as in each case the violations were willful, frequent (in fact continuing) and current.

11. Bryan's unlawful operation was not only willful, it was equally self-serving. Thus, while Bryan contends that he obtained no economic benefit from his unlawful operation and, indeed, was required to pay additional utility charges, his contention ignores the fact that he avoided the more significant costs of repairing or replacing his transmitter. As such, it was fundamentally an economic decision on Bryan's part to engage in a course of action in violation of numerous Commission Rules, rather than to expend the funds necessary to allow him to operate in a lawful manner. ⁶/ A licensee's election not to comply with the Rules confers in every instance an unfair competitive and economic advantage over the licensee's competitors who incur the costs of compliance, which it avoids through its noncompliance. As such, Bryan's conduct is clearly predictive of what can be expected of him as a prospective licensee of the new FM station at Tusculum and, accordingly, is entirely relevant in the context of this proceeding. Indeed, the cavalier attitude evidenced by

6. While Bryan notes the fact that he has taken remedial measures and corrected the problem, it must be emphasized that these corrective actions were undertaken only subsequent to the inspection of the station's public file and facilities by Mr. Murray in July of 1993. Thus, it was only after Bryan became aware that the station was under scrutiny that he took corrective action, both by ceasing the unlawful unattended operation of the transmitter and by repairing the remote monitoring meters (See: para. 12, infra.).

Bryan with regard to these very serious violations of the Commission's Rules should also be considered in the context of this proceeding.

III. Operation In Excess of Authorized Power.

12. In its Petition, SBH sought the addition of an issue to determine whether Bryan had operated WSMG in excess of its authorized power, premised upon transmitter logs which reflected on their face that the station was being operated in excess of authorized power. In his Opposition, Bryan acknowledges that the readings on the transmitter logs do in fact reflect operation in excess of authorized power, but contends that that this was simply a case of erroneous readings due to a malfunctioning remote meter and that, in reality, the transmitter was operating within tolerance. As Bryan explains, the sampling cable for the remote meter was accidentally cut and subsequently spliced in July, 1992. From that time until the transmission line was replaced on August 16, 1993 Bryan states, "the splice picked up radiation from the antenna, causing erroneously high antenna current readings at the remote meter." Bryan's local engineer indicates in his Declaration (Opposition at Attachment E) that Bryan was aware of the erroneous nature of the remote meter readings at the studio location and, for this reason, weekly readings at the transmitter to assure that the transmitter was operating within tolerance.

13. Based upon a statement of Garrick Lysiak (Opposition at Appendix F) Bryan contends that utilizing the indirect method of

calculation, it can be determined that the station was operating within tolerance. However, as reflected in the attached Declaration of David Murray, while Mr. Lysiak's methodology is sound, his conclusions are not, inasmuch as they are based upon an undemonstrated and, accordingly, potentially false premise. In that regard, as Murray demonstrates, Bryan has offered no evidence demonstrating that 70% is the proper efficiency factor to be applied in this instance, consistent with the requirements of Section 73.51 of the Commission's Rules. Therefore, there remains a material question of fact regarding whether WSMG has operated in excess of its authorized power, warranting addition of the requested issues.

14. Furthermore, in light of the admission by Bryan that the meters utilized during remote control of the transmitter gave erroneous readings and that this fact was known to Bryan and allowed to continue for a period of over a year, it must be concluded that Bryan's course of operation in this regard was both willful and resulted in violation of applicable Rules. Thus, Bryan's operation violated 73.51(a) which requires that the direct measurement method of calculation be utilized. While Section 73.51(d) permits utilization of the indirect method under certain limited and temporary circumstances, Section 73.51(d) also requires that, whenever the indirect method is utilized, appropriate notations be made on the transmitter logs. As reflected in Attachment 2 to Exhibit E to SBH's Petition, no such notations were made on WSMG's logs in this instance.

Furthermore, the inability of operators to take accurate readings at the remote control point precluded them from determining whether or not the transmitter was operating within tolerance during any period of the station's operation, as required. ⁷/ Under such circumstances, WSMG violated both the requirements regarding remote control operation, set forth in Section 73.1410, and the requirements relating to the obligations of operators on duty, set forth in Section 73.1860.

15. Finally, as reflected in the attached Declaration of David Murray, it must be emphasized that the problem, as identified by Bryan, could have been easily and inexpensively resolved by simply recalibrating the remote meters. Thus, the fact that Bryan permitted WSMG to operate without the benefit of accurately calibrated remote meters for a period of over a year not only resulted in the violation of Sections 73.1410 and 73.1860 of the Rules, but further reflects his lackadaisical approach to compliance with Commission Rules, even where only the relatively minor expense of replacing a sampling cable or re-calibrating a meter is involved.

16. Therefore, in light of the facts admitted in Bryan's Opposition, the Presiding Judge should reform requested issue number 2 to permit inquiry with respect to the above referenced violations of Sections 73.1410 and 73.1860 of the Rules, or,

7. It appears that WSMG is operated at all times from its studios located at 942 Snapps Ferry Road, which is the station's designated remote control point.

alternatively, should include an additional issue:

To determine whether Bryan violated the Commission's Rules in his operation of WSMG by permitting remote control operation of the station for a period of over a year in the absence of accurately calibrated remote meters.

IV. Public File Issues.

17. In its Petition, SBH sought an issue to determine whether Darrell Bryan had violated Sections 73.3526(a)(9) and 73.3526(e) of the Commission's Rules in his operation of WSMG by failing to prepare and place the required quarterly issues/programs list in the station's public file. The requested issue was premised upon an inspection of the station's public file on July 8, 1993, which revealed that as of that date, no quarterly list had been prepared and included in the public file for the periods of October, 1986 through December, 1990, July through December, 1991 and July through December, 1992. In response, Bryan does not dispute the fact that the referenced issues/programs lists were missing from the public file at the time of Murray's inspection on July 8, 1993, but contends that the missing lists were, unknown to the employee responsible for the public file at the time of Murray's visit, spread out on the desk of Kathy Knight at another location in the studio building. Assuming for the sake of argument that Bryan's contention is correct, it would not obviate the fact that WSMG violated Sections 73.3526(a)(9) and 73.3526(e) of the Commission's Rule by failing to maintain the required issues/programs lists in its public file and by failing to make them available to Mr. Murray

during regular business hours.

18. Likewise, it remains unclear, based upon Bryan's explanation, whether the missing lists were timely prepared and placed in the public inspection file, and if so, when they were removed and when they were returned. Bryan offers no evidence, whatsoever, in this regard. Thus, while it is clear that on July 8, 1993, WSMG violated Section 73.3526 by failing to maintain the appropriate lists in its public file and by denying access to them to a member of the public, a material question of fact remains regarding the extent and duration of WSMG's violation of Section 73.3526, inasmuch as Bryan has never once suggested that July 8, 1993 was the only day on which the issues/program lists were "missing."

19. As a fundamental matter, the Commission's Rules do not permit a licensee to remove the required issues/programs lists from the public file during regular business hours. Accordingly, should it have been necessary to "work on" the quarterly lists, such work was required to be coordinated with the requirements of the Rules, i.e., assuring that such work did not interfere with the station's obligation make the lists available for review by members of the public during regular business hours, Monday through Friday.

20. Furthermore, Bryan's explanation that the missing lists were located in an office of Kathy Knight, because Ms. Knight was "working" on them, due to having received an unidentified "FCC checklist," is highly questionable. Indeed, Bryan's response is

extremely troubling, inasmuch as it fails to offer any explanation regarding why it was necessary in July, 1993 to "work on" quarterly lists which were to have been prepared and placed in the public file as much as seven years earlier. As noted in Murray's attached Declaration, in examining files which were given to him on July 8, 1993, he noted that a number of files folders, which were identified "Public Affairs," included numerous and various scraps of paper, receipts, letters, notes, etc., as well as numerous blank "Public Affairs File" forms. The inclusion of these documents in files identified as "Public Affairs" reasonably suggested to Murray a course of conduct in which the station would accumulate various documents related to programming and PSAs broadcast by the station during a given period of time and subsequently fill in the blank "Public Affairs File" forms with information from such documents in lieu of creating quarterly lists. ⁸/ Thus, when these facts are considered in light of Bryan's claim that Ms. Knight was working on lists for quarters dating back as far as seven years ago, serious questions are raised concerning whether WSMG was in fact creating the "missing" lists after the fact and, if so, precisely

8. As Murray notes, WSMG has not for any quarter included a issues/programs list per se (i.e., a comprehensive "list of programs that have provided the station's most significant treatment of community issues during the preceeding three month period"), but instead has included numerous filled-in "Public Affairs File" forms of the type appended as Attachment I to Exhibit E of SBH's Petition. While SBH raised (Petition, para. 13) the contention that WSMG had failed to properly prepare such issues/programs lists as it had included in its public file, Bryan failed to address this allegation in his Opposition.

what, if anything, WSMG had placed in its public file in a timely manner with respect to each of the quarters in question.

21. In addition, Murray flatly refutes the contention contained in the Declaration of Darrell Bryan (Exhibit G to Bryan's Opposition) that "the public affairs file from 1986 through 1990 was in the file drawer at the time." As Murray indicates, he stood next to Ms. Thompson and reviewed with her the contents of the file drawer in which the public inspection file was contained at the time she removed it for his inspection. There were no additional public affairs files contained in the drawer at the time which were not provided to Mr. Murray by Ms. Thompson. Furthermore, Bryan's contention is in conflict with Ms. Knight's contention that all of the missing files were in her office.

22. With regard to Bryan's contention that Mr. Murray failed to do enough to locate the missing files, Bryan's attempt to blame Murray for his station's noncompliance is ludicrous and provides further evidence of the cavalier attitude regarding compliance which may be expected of him as a licensee. It was the obligation of WSMG to have the required issues/programs lists in its public file and available for public inspection during regular business hours and it cannot excuse its own failure to comply with the Commission's public file requirements by attempting to blame a member of the public who happens to request to inspect the public file. As reflected in his Declaration, Mr. Murray repeatedly confirmed with Ms.

Thompson that she had given him the entire contents of the station's public file and that she was not aware of the location of any other files. While Ms. Thompson did indicate to Mr. Murray her willingness to contact Kathy Knight, at no time did she indicate that the missing files might be elsewhere on the premises, such that they could readily be reviewed by Murray. Moreover, having discovered that documents required to be maintained in the file were missing, Ms. Thompson was obligated to undertake whatever efforts were necessary to assure that the station was in a position to comply with the requirements of the Commission's Rules, regardless of what Mr. Murray may or may not have requested.

23. In its Petition SBH contended that even those issues/programs lists which WSMG had prepared and placed in its public file "fail to reflect the airing of any significant issue-related programming." In his Opposition Bryan utterly fails to offer any evidence to rebut SBH's contention in this regard. While Bryan identified a total of three programs, which he claims are broadcast by WSMG and which he claims address significant issues to the community (i.e, agriculture and education), Bryan offered no evidence that the referenced programs are reflected in any issue/program list prepared and included in the station's public file. On the contrary, the "Public Affairs Forms" appended to SBH's Petition (as Attachment 1 to Exhibit E), which constitute all of WSMG's issues/programs lists for the period of January-June, 1993, do not once mention

any of the three programs referred to in Bryan's Opposition. Accordingly, appropriate issues are warranted and should be specified.

24. As a part of SBH's efforts in preparing this Reply, William Seaver traveled to Greeneville, Tennessee and visited WSMG's studios on Friday, December 3, 1993 for the purpose of reviewing the station's public file and, particularly, the issues/programs lists which had been absent from the file on July 8, 1993 when David Murray conducted his inspection. As reflected in his attached Declaration (Exhibit B, hereto), Mr. Seaver was not only denied access to the "missing lists," he was denied any access, whatsoever, to WSMG's public file. In refusing Mr. Seaver access to WSMG's public inspection file, the employee in charge, Connie Thompson, explicitly advised Mr. Seaver that she was under express orders from Darrell Bryan that she was not to make the station's public inspection file available to anyone, unless Bryan was present. Inasmuch as Mr. Seaver was denied access to the file based upon explicit orders from Bryan and inasmuch as this action served to frustrate SBH's ability to fully address issues relating to WSMG's compliance with the Commission's public file requirements, this fact should be taken into consideration and construed most unfavorably against Bryan in the consideration of SBH's request for the enlargement of the issues to permit adduction of evidence regarding WSMG's compliance with Commission Rules and Bryan's unusually poor past broadcast record. SBH has more met its burden of advancing the

required prima facie showing, warranting the addition of the issues requested.

V. Threshold Showing.

25. SBH submits that the totallity of the evidence presented, including numerous rule violations, which were willful, frequent and current, evidence of Bryan's cavalier attitude toward his violation of the Rules, as well as his demonstrated willingness to subordinate compliance with the Commission's Rules to his own (relatively minor) economic interests, establishes more than a prima facie showing of an unusually poor broadcast record, warranting further inquiry. Therefore, the issues should be enlarged to permit exploration of Bryan's past broadcast record under the standard comparative issue.

VI. Discovery.

26. In light of the admissions contained in Bryan's Opposition, the production of the following additional documents is requested:

1. All logs for WSMG, between the dates of July 1, 1992 and August 31, 1993.

WHEREFORE, the Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record should be GRANTED and

the issues enlarged as requested.

Respectfully Submitted,

SBH PROPERTIES, INC.

By: 

Timothy K. Brady
Its Attorney

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December 10, 1993

DECLARATION

I, J. Kent Bewley, do hereby certify that:

1. I have reviewed and wish to make the following comments with respect to the Declaration of Frank Harkins, Sr., dated November 11, 1993. As an initial matter, I stand by the contentions made in my September 28, 1993 Declaration. While it is true that Mr. Harkins did not explicitly state that he was "involved with the radio application" or that he was "going to provide financial support to the station," he did in fact make each of the statements attributed to him in my September 28, 1993 Declaration.

2. Although Mr. Harkins indicates that he does not recall exactly what he said on that occasion, I clearly recall his statement that he was "going to have to help them," his identification of "them" as "Kathy and Darrell" and his response to my inquiry whether he was going to be involved: "Not in the operation of the station, but kind of like you and Paul." I would presume that my recollection of what Mr. Harkins said in April, 1992 remains so clear, due to the fact that the conversation was so unexpected and because I was so surprised by his statements, which clearly indicated to me an expectation or intention on his part of being involved in at least an investment capacity in the FM radio station applied for by Darrell Bryan.

3. Based on my knowledge of Mr. Harkins, as well as his reputation in the community, I am confident in my belief that he is not nearly so destitute as one might conclude from his comments and that he would have the financial ability to invest in Bryan's application should he desire to do so.

4. Finally, Mr. Harkins refers in his Declaration to a conversation he had with me in October, 1993. To the extent that Mr. Harkins contends that I indicated that I wished I was not involved in SBH Properties, Inc., he apparently misunderstood what I said to him at that time. While I did indicate that I was extremely busy with my various businesses and would have difficulty taking on additional time commitments, that fact has no impact on my involvement in SBH, inasmuch as I obviously have not proposed to be active in SBH and, instead, am involved solely as a nonvoting shareholder.

I hereby certify under penalty of perjury that the above statement is true.

Signed and dated this 8th day of ^{December}~~November~~, 1993.


J. KENT BEWLEY